

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID STEBBINS,

PLAINTIFF

VS.

Case 23-15531

KARL POLANO, et al

DEFENDANTS

MOTION FOR SUMMARY REVERSAL

Comes now, pro se Plaintiff David Stebbins, who hereby submits the following Motion for Summary Reversal in the above-styled action.

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FACTS OF THE CASE

1. Around late February of 2021, a handful of trolls began to harass and dox me online. This included uploading clips from my YouTube and Twitch channels. This ultimately culminated in me filing suit on June 2, 2021. After the First Amended Complaint, I alleged (A) one count of intentional infliction of emotional distress, (B) two counts of copyright infringement, and (C) two counts of DMCA Misrepresentation under **17 USC §512(f)**, one for issuing a false DMCA Counter-Notification under §512(f)(2), and another for issuing a false, retaliatory DMCA Takedown Notice against me in violation of §512(f)(1). See **Dkt. 11**. After reviewing the complaint pursuant to **28 USC §1915(e)**, the Court dismissed sua sponte the IIED and §512(f)(2) misrepresentation claims, while allowing the copyright infringement claims and the §512(f)(1) misrepresentation claim to all proceed. See **Dkt. 21**. The Complaint was later amended a second time to include another count of copyright infringement. See **Dkt. 55**.

2. In the Complaint, I listed four corporations and three individuals as defendants. The corporate defendants were Alphabet Inc., Discord Inc., Amazon.com Inc., and Facebook Inc. The individual defendants were Karl Polano of Switzerland, Raul Mateas of the United Kingdom, and Frederick Allison of the State of Georgia. Three of the corporate defendants – Alphabet, Discord, and Amazon – were nominal defendants, who were only included so they could terminate the accounts of the individual defendants after I defeated them in court, pursuant to **17 USC §512(j)**. I eventually dismissed Facebook (the only corporate defendant who was being sued for damages) as a defendant in that case. See **Dkt. 95**.

3. Since two of the individual defendants were foreign nationals, I had to serve them with process via the Hague Convention, which was a long and tedious process. As a result, the last of the three to be served with process (Karl Polano of Switzerland) was served on March 15, 2022 (see **Dkt. 117 & 118**). All three individual defendants were entered in default, with the latest entry of default happening on April 6, 2022. See **Dkt. 91**, **Dkt. 123**, and **Dkt. 125**.

4. Because the corporate defendants were only nominal defendants who I was not seeking any substantial relief against, I made the tactical choice to voluntarily dismiss them pursuant to Fed.R.Civ.P. 41(a)(1). See **Dkt. 128**. This happened at 12:57pm, pacific time, on April 11, 2022.

However, at 1:20pm pacific time on that same day, the corporate defendants nonetheless filed their motion to dismiss. See **Dkt. 129**. The District Court struck the motion all the same. See **Dkt. 134**. However, during this Order, the District Court made no secret that he is angry at me for having filed this voluntary dismissal that he personally disapproved of, and threatened to declare me a vexatious litigant if I did it again. See p.1, lines 24-26. Pursuant to **L.R. 27(a)(2)(B)(iii)**, a copy of this opinion is attached as **Exhibit A**.

5. On April 20, 2022, Alphabet, along with the newly-listed party of YouTube LLC, filed a Motion to Intervene, restating verbatim the arguments they made in their motion to dismiss, and openly acknowledging that they viewed this motion to intervene as a means of circumventing the voluntary dismissal. See **Dkt. 138**. I opposed this motion, claiming, among other things¹, that the voluntary dismissal was absolute and could not be circumscribed in any way, shape, or form, no matter what.

6. On July 11, 2022, the District Court issued an order granting the motion to intervene, and finding the underlying copyrighted work to not be subject to copyright protection. See **Dkt. 158**, which is attached as **Exhibit B**. When granting the motion to intervene, the District Court openly admitted that he was doing this in large part because he held a grudge against me for issuing the voluntary dismissal. See p.4, lines 17-21. The Court also found that my copyright registration was invalid, but in making this finding, he only found that the registration contained inaccurate information. He did not make the finding that I provided this false information knowingly, or that the Copyright Office would have refused registration had they known the full truth (p.7, lines 3-6), despite acknowledging that both were required (p.7, lines 1-2). Meanwhile, the §512(f)(1) claim remained adjudicated entirely.

7. The District Court simultaneously issued a dispositive order in a related case. In Case 4:22-cv-00546-JSW (Stebbins v. Rebolo), the District Court found, among other things, ...

(a) My “proven lack of candor” (specifically, the inaccurate information in the copyright registration for *this* case) overcomes the “presumption of validity” for all other copyrights, as normally required under **17 USC §410(c)**. Therefore, none of the copyrighted works I sought to enforce in that case were valid.

¹ things I intend to argue in the full brief, should this Motion be denied.

(b) All of the infringements were “clearly fair use criticism,” despite not considering the totality of the four factors test required by **17 USC §107A(1)-(4)**, and in spite of an earlier order where he stated that all fair use allegations must be determined on a case by case basis, and that blanket determinations of fair use were impossible².

(c) I am merely attempting to silence online criticism about me. This finding was made without even so much as an iota of evidence.

(d) And many, many other things that I need not get into in this case because it is not the subject of this appeal.

8. See **Dkt. 20**, which is attached as **Exhibit C**.

9. In both cases, I filed motions for leave to file motions for reconsideration. See **Dkt. 159**. Pursuant to the Local Rules, I did not file a motion for reconsideration outright, since that was not allowed. Instead, I filed motions *for leave to file* motions for reconsideration, which did not contain the arguments that would have been found in the motion for reconsideration. I also moved to recuse. See ¶¶ 11-12.

10. On March 28, 2023, the District Court issued an order denying the motion for reconsideration, even though I never filed a motion for reconsideration. See **Dkt. 187**, which is attached as **Exhibit D**. He also declined to recuse, citing *Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381, 1388 (9th Cir. 1988) in support of its conclusion of law that recusal is required only “if the bias or prejudice stem from an extrajudicial source and not from conduct or rulings made during the course of the proceeding.” In making this conclusion of law, he admits that he does indeed hold a bias against me, just that he felt it was legally exempt from recusal.

11. I filed a Notice of Appeal forthwith. See **Dkt. 188**.

² See Dkt. 115, p.5, lines 10-17.

RELIEF SOUGHT

12. First, I seek an order reversing and remanding the District Court, forcing Judge White to recuse himself from the proceedings and vacate all orders that were entered after he developed his grudge against me. This includes the order granting the motion to intervene and dismissing the case with prejudice.

13. If that is not granted, then I at least request an order reversing and remanding to the District Court, commanding it to deny the motion to intervene on the grounds that intervention cannot be used to circumscribe a voluntary dismissal under Rule 41. The District Court should also be commanded not to consider my voluntary dismissal, or any hard feelings it may have against me for issuing said voluntary dismissal, in any of its future actions, because to do so would be tantamount to punishing me for having issued the voluntary dismissal, and that is patently unconstitutional.

14. I also ask that the District Court be admonished not to invalidate a copyright registration simply because it contains inaccurate information, as the plain text of the statute explicitly states that this is not enough to invalidate a registration on its own.

15. Lastly, the District Court should be ordered to issue a proper ruling on the remaining Sec. 512(f) claim, which he failed to do even after a motion to vacate judgment was filed.

ARGUMENT

16. Summary reversal, without briefing, is exceptionally rare, and is typically reserved only for cases where the District Court flagrantly failed to properly apply a bright line rule, or where the appellant's fundamental constitutional rights were undeniably violated in such a way that the Court can clearly see from even a preliminary review of the district court record.

Recusal

17. Recusal is mandatory whenever a judge's impartiality might reasonably be questioned. See 28 USC §455(a). Recusal under this section does not require a showing of *actual* judicial partiality, only the *reasonable appearance* of judicial partiality. See *Liljeberg v. Health Services Acquisition Corp.*, 486 US 847 (1988). Moreover, the right to an impartial judge is so fundamental that it can “never be treated as harmless error.” *Arizona v. Fulminante*, 499 US 279, 308 (1991) (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

18. Here, actual judicial bias (not merely the appearance thereof) is proven by the District Court's own admission. In denying the motion to recuse, the District Court admitted to holding a grudge against me as I feared; he simply felt that he was legally exempt from recusal because of the *source* of the grudge. He cites *Toth v. Trans World Airlines* in support of his conclusion of law.

19. However, that precedent is not absolute, as the District Court appears to believe. It was partly superseded by the Supreme Court in the case of *Liteky v. USA*, 510 US 540 (1994), which states in pertinent part that “opinions formed by the judge on the basis of ... events occurring in the course of the current proceedings” do indeed constitute grounds for recusal when “they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.” See *id.* at 555. Such a showing *necessarily* constitutes grounds for recusal, as evidenced by the word “will” in italics immediately prior to that excerpt, juxtaposed with the word “may” (also in italics) earlier in that same sentence.

20. Here, the level of antagonism required by *Liteky* is proven by the District Court's own admission. He does not deny holding a grudge against me, nor does he deny that this grudge would be grounds for recusal, were it not for this alleged exception to bias which stems from on-

record sources.

21. Moreover, he admits on-record that he used this grudge against me as a factor in deciding the motion to intervene (see Exhibit B, p.4), and will likely continue to use it as a factor in all future rulings if he is allowed to remain as my judge. This is not speculative; this is a tangible, proven effect that his bias against me has had that has directly affected my legal rights.

22. All of this is proven *by the judge's own admission!*

23. For this reason, this Court should (A) summarily reverse the judgment in the District Court, (B) order Judge White to recuse himself from both this case and the case of Stebbins v. Rebolo, and (C) vacate all orders of the district court in both cases that occur on or after April 11, 2022. Anything short of this is a violation of my absolute constitutional right to an impartial judge.

Leave Motion vs. Reconsider Motion

24. After this, the District Court abused its discretion when it proceeded to treat my Motion *for leave to file* a motion for reconsideration as the motion for reconsideration itself. The district court's local rules explicitly require movants to file a motion for leave to file *before* filing the motion for reconsideration itself. See NDCA L.R. 7-9(a) (“No party may notice a motion for reconsideration without first obtaining leave of Court to file the motion”).

25. On multiple occasions throughout the case, I repeatedly made it clear, in no uncertain terms, that this motion was not a reconsider motion, but merely a leave motion. See, for example, ...

(a) The leave motion itself (Dkt. 159), where I repeatedly made such statements as...

i. ¶2 (“leave to file a motion to reconsider should be granted so I can provide this legal authority which the Court says I lack.”)

ii. ¶6 (“If given leave to file the motion to reconsider, I can show ample argument-”)

(b) Dkt. 167 (Reply to Opposition to Motion to Vacate Judgment), where I make such statements as...

i. ¶2 (“I would like to emphasize that the Motion for Leave to File a Motion for Reconsideration... was not meant to be dispositive on its own. As per the local rules, I

cannot simply file the motion for reconsideration without first seeking leave of Court. If leave is granted, then and only then will I file the motion for reconsideration which will contain the actual arguments, facts, and evidence”)

ii. ¶4 (“But I need leave from the Court to file the motion to reconsider before I can do that”)

iii. ¶6 (“I will provide more if the motion for leave to file a motion for reconsideration is granted”)

(c) Dkt. 172-1, ¶13 (“Because I was only supposed to file a motion *for leave to file a motion* for reconsideration, my arguments contained in the motion were admittedly underdeveloped. This was not meant to be the main motion for reconsideration, so I saved my best arguments for the motion proper”)

26. Despite these numerous, unambiguous notifications, the District Court nonetheless proceeded to treat the leave motion as a reconsider motion. It then proceeded to deny the motion based on the fact that the motion does not contain fleshed out arguments or legal citations *that weren't supposed to be there!* This is a manifest abuse of judicial power and it deserves summary reversal.

27. At this point, I'm in an impossible situation. If I follow the local rules, the Court can simply treat my leave motion like a reconsider motion and deny it on the basis of how undeveloped my arguments are. But if I file it like a reconsider motion and properly develop my arguments, the District Court can deny the motion on the grounds that it was a reconsider motion improperly styled as a leave motion, and was filed without leave of court as required by Local Rule 7-9(a). At this point, the District Court is *literally* making up the rules as it goes along!

28. If the District Court wishes to abolish the leave requirement and allow motions for reconsideration to be filed without leave of court, it is absolutely within its power to do so. But it must actually amend its local rules in order to do so. Whatever it chooses, this Court should command it to pick a policy and *stick with it*.

29. As for the current case, however, summary reversal is warranted because the District Court flagrantly abused its power and restyled the motion to one it knew full well wasn't actually

before it.

Absoluteness of Voluntary Dismissal

30. Barring that, the District Court still violated a bright line rule (which, as explained earlier, constitutes grounds for summary reversal, even in the absence of a fundamental constitutional right) when it granted the motion to intervene. The reason this motion to intervene should not have been granted is because it effectively nullified the voluntary dismissal.

31. By the District Court's and Intervenor Defendants' own admission, nullifying the voluntary dismissal was, in fact, the whole point of seeking intervenor standing in the first place. By the Intervenor's own admission, this motion was designed to “deal with” the voluntary dismissal by giving the court “another way” to allow them to stay in the case despite being dismissed. See **Dkt. 138**, p.6, lines 21-22. The Court also openly admitted that it was granting this motion, at least in part, in order to nullify the voluntary dismissal which it disapproved of. See above.

32. However, they cannot do this. The right to a voluntary dismissal is absolute and impenetrable. See *Commercial Space Management Co. v. Boeing Co.*, 193 F. 3d 1074, 1077-80 (9th Cir. 1999):

“a court has no discretion to exercise once a Rule 41(a)(1) dismissal is filed. It is well settled that under Rule 41(a)(1)(i), a plaintiff has an absolute right to voluntarily dismiss his action... There is nothing the defendant can do to fan the ashes of that action into life... and may not be extinguished or circumscribed by adversary or court... the defendant can't complain, and the district court lacks jurisdiction to do anything about it... the whole point of a Rule 41(a)(1) dismissal is to give the plaintiff an 'absolute' way out.”

33. The law makes itself perfectly clear on this. Now that these defendants have been dismissed from the case, they cannot reignite their interest in litigating the case for any reason whatsoever. As a result, this Court should not have granted the defendants' motion to intervene, as that effectively gave the defendants a back door to allow them to fan the ashes of the action back into life, and to circumscribe (however indirectly) the dismissal by adversary or by court. Such a result is explicitly not allowed under the binding precedent. They were dismissed. The dismissal is absolute. There is nothing they can do about it, directly or indirectly. It's over.

They're gone. Period.

34. When granting the Motion to Intervene, the judge's logic for how it had the power to supersede the voluntary dismissal that cannot be superseded was merely that "Plaintiff cites no authority for the proposition that Rule 41(a) dismissal prevents permissive intervention Rule 24(b) under these circumstances."

35. But the judge is wrong. I did indeed cite an authority to that effect. Specifically, I cited *Comm. Space Man. v. Boeing*, which unequivocally and unambiguously held that the effect of a voluntary dismissal is **absolute!** This means that it necessarily encompasses everything under the sun, literally the entire universe of attorney creativity, from zero to infinity on the X, Y, and Z axes. What's next? If I ask an astronomer to give me the total mass in the entire universe, should I be expected to spell out for him that Jupiter, specifically, is meant to be included in that calculation?! If anything, there should be a positive law stating that a motion to intervene *can* be used to circumvent this otherwise impenetrable right, not a citation stating that it *can't* be used to do that!

36. But even barring that, there are indeed case laws out there that affirmatively state that a motion to intervene cannot be used to get around a voluntary dismissal under Rule 41(a)(1). See *Dukes v. Wal-Mart Stores, Inc.*, Case No. 01-cv-02252-CRB, 5 (N.D. Cal. Aug. 15, 2016)³ ("[T]he Court lacks jurisdiction to adjudicate the Proposed Intervenor's Motion to Intervene") and *Fort Sill Apache Tribe of Okla. v. United States*⁴, 2008 WL 2891654, at *1 (W.D. Okla. July 23, 2008) ("The fact that a motion to intervene is pending at the time the notice is filed does not affect the automatic dismissal provided for by Rule 41(a)(1)(A)(i) and (B)... a motion to intervene should not affect the plaintiff's right to dismiss as of right") just to name a few.

37. Therefore, because the District Court violated a bright line rule by circumventing the voluntary dismissal and refusing to give it the effect to which I was absolutely entitled, summary reversal is warranted.

Dismissal a Factor in Intervene Motion

38. To the extent that the right to a voluntary dismissal is not absolute, it was still an abuse of

³ The unpublished opinion can be found at https://scholar.google.com/scholar_case?case=1581261639147081396.

⁴ The unpublished opinion can be found at https://scholar.google.com/scholar_case?case=7366738215539446155.

discretion for the Court to consider the dismissal as a factor in granting the motion to intervene.

39. One way in which an appellant can show an abuse of discretion is by showing that the District Court substantially considered a factor that it should not have considered. Here, the judge considered the fact that he did not approve of my voluntary dismissal as a factor when granting the motion to intervene, and he admitted on the record to considering this factor. See Exhibit B, p.4. In making this consideration, the Court made no secret that it sought to discourage future filings of voluntary dismissals it didn't personally approve of. By having this voluntary dismissal, and his disapproval of same, be a factor weighing in favor of granting leave to intervene, the Court was effectively punishing me (however slightly or indirectly) for having issued the dismissal.

40. This is an egregious violation of my constitutional rights. See *Bordenkircher v. Hayes*, 434 US 357, 363 (1978):

“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional.” (citations and quotations omitted).

41. For this reason, this Court should summarily reverse the District Court's decision for abuse of discretion, and remand to the District Court with instructions not to consider the voluntary dismissal in any future orders.

Invalidation of Registration

42. When discussing the merits of the case, the District Court committed yet another error so egregious that it justifies summary reversal. When it declared the copyright registration invalid, the District Court articulated the correct legal standard under 17 USC §411(b), but then utterly failed to make the findings that it knew were required by law.

43. The District Court declared the registration invalid, and therefore declared that there was no presumption of copyright validity, simply because the registration contained “inaccurate information.” Specifically, he is referring to the fact that my copyright registration erroneously listed the livestream as a “dramatic work” when it should have been properly listed as an “audiovisual work.” Just on this one error alone, the District Court declared the entire

registration invalid.

44. The plain text of the statute clearly states that a registration cannot be declared invalid just on this alone. See 17 USC §411(b)(1):

“A certificate of registration satisfies the requirements ... regardless of whether the certificate contains any inaccurate information, unless (A) the inaccurate information was included on the application ... with knowledge that it was inaccurate; and (B) the inaccuracy ... if known, would have caused the Register of Copyrights to refuse registration”) (emphasis added).

45. Even errors of law, not just fact, are forgiven under this statute as long as the mistake was made in good faith. See *Unicolors v. H&M*, 142 S. Ct. 941 (2022).

46. The District Court knew about these two additional requirements. It even listed them at Exhibit B, p.7. But then, it utterly failed to make findings pursuant to these two legal requirements. It never made any finding that *I knew*, at the time that I applied for registration, that the livestream was properly categorized as an audiovisual rather than dramatic work, nor did it make the finding that, had I categorized it as an audiovisual, the Copyright Office would have denied registration. In fact, the court actively ignored evidence I provided which showed that the Office actually knew about this error and granted registration anyway!

47. This is more than just declaring the livestream to not be copyrightable in this one case. In the related case of *Stebbins v. Rebolo*, the District Court used this already-erroneous decision to declare all of my copyrights invalid, even those where I obtained valid registrations, and depriving me of the presumption of copyright validity to which I am entitled under 17 USC §410(c). See **Exhibit C**, p.4 (“The Court finds that Plaintiff’s proven lack of candor in his prior application overcomes the presumption of validity afforded by registration of the other livestream videos”).

48. This is not happening in a bubble; it is an abuse of discretion that is directly informing other erroneous judgments that is further prejudicing me later down the line. All because of that voluntary dismissal he didn't like.

49. Therefore, this absolutely needs to be stamped out quickly, before the District Court has the chance to use it to inflict any more harm onto me. Summary reversal is justified here.

The remaining §512(f) claim.

50. Although the District Court found the copyright infringement claims to be without merit for reasons I will discuss in the Appellant Brief should this motion for summary reversal be denied, he also failed to adjudicate the remaining §512(f) claim. This alone renders the entire judgment a violation of my constitutional rights. See *Stebbins v. Stebbins*, 2017 Ark. App. 428 (2017) (“[I]t is not enough to dismiss some of the parties or to dispose of some of the claims; to be final and appealable, an order must cover *all of the parties and all of the claims*”) (emphasis in original).

51. When denying the motion for leave to file motion for reconsideration (which the Court erroneously construed as a motion for reconsideration), the District Court gave summary disposition of the remaining claim, but his findings of fact and conclusions of law were sloppy to say the least. It reeks of a desire to keep the case closed because he already has his mind made up that he personally does not like me, and then retroactively came up with reasons to justify that.

52. First, he makes the conclusory allegation that the allegations are insufficient and not well-plead. He makes no effort to explain exactly why he feels this way, and more importantly, this directly contradicts his own ruling from earlier in the case, when he conducted a §1915 review of the First Amended Complaint and found the complete opposite, that I had indeed sufficiently stated a claim under §512(f). See **Dkt. 21**, pp. 3-4, hereby attached as **Exhibit E**.

53. For example, the Court found that I had failed to “allege facts which identify how or why Mateas knew or should have known that the material was non-infringing.” See Exhibit D, p.6. But in Exhibit E, the Court conceded that I had plead that Mateas "does not own the copyright to the picture" and that "members of a certain Discord server, which ... includes [Mateas], intended to make 'false copyright strikes in retaliation' for Plaintiff’s takedown notice against Polano.” See Exhibit E, p.3. How do either one of those allegations fail to identify this?

54. As such, it's not enough that the Court justify dismissing my case with prejudice based on insufficient pleading. The Court should also be required to justify why it changed its story and issued a ruling contrary to what it previously found for no apparent reason.

55. Of course, I know the reason. It's because, in between these two orders, I made a

voluntary dismissal that the judge didn't approve of.

56. Second, the Court made the outlandish claim that I was seeking \$1,800,000 *just* from the misrepresentation claim, instead of the copyright infringement claims. See Exhibit D, p.6. This finding is patently absurd and this Court should admonish the District Court for making it.

57. Third, the District Court committed an egregious abuse of discretion when it refused to give me the chance to file a new motion for default judgment, correcting any deficiencies that could potentially be corrected by re-filing. Instead, the Court dismissed the case *with prejudice* without any indication that any errors (most of which it created from whole cloth) could not be corrected on a re-filing.

58. This is an egregious violation of my due process rights and it deserves to be stamped out with extreme prejudice.

No forfeit of other grounds for vacation

59. By filing this motion for summary reversal, I am not forfeiting the right to file a full Appellant Brief and litigate all of the other reasons why the District Court's judgment should be vacated and remanded, including but not limited to ...

(a) Whether a work that is created by accident can have enough creativity in it to be copyrightable under *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 US 340 (1991).

(b) Whether “creative choices” are required under copyright law, or simply “creativity.”

(c) Whether a figure of speech that was never meant to be taken literally can in fact be used as a literal admission to a lack of human authorship.

60. All of these issues will be fully argued in the Appellant Brief should one need to be filed. I did not include them here because, as novel issues of law, I concede that they cannot be disposed of on a motion for summary reversal, as they are not bright-line rules. These issues are not forfeited.

61. Of course, if this Court were to grant this Motion for Summary Reversal, I may not have to submit the full Appellant Brief. The remaining issues would then need to be relitigated in the District Court before they can be appealed again.

CONCLUSION

62. Wherefore, premises considered, I respectfully pray that the judgment be summarily reversed, and for any other relief to which I may be entitled.

So requested on this, the 11th day of April, 2023.

/s/ David Stebbins
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID A. STEBBINS,
Plaintiff,

v.

KARL POLANO, et al.,
Defendants.

Case No. 21-cv-04184-JSW

**ORDER REGARDING NOTICE OF
VOLUNTARY DISMISSAL AND
STRIKING MOTIONS**

Re: Dkt. No. 129, 130, 133

On April 11, 2022, Plaintiff filed a notice of voluntary dismissal without prejudice as to Defendants Alphabet Inc., Discord Inc., and Amazon.com Inc. pursuant to Federal Rule of Civil Procedure 41(a)(1). Shortly thereafter, the Corporate Defendants filed a joint motion to dismiss. (Dkt. No. 129.) Plaintiff then filed a motion to strike the motion to dismiss in light of his notice of voluntary dismissal. (Dkt. No. 130.) Corporate Defendants filed a response to Plaintiff's motion to strike. (Dkt. No. 131.) Plaintiff filed a reply followed by a motion styled as an "Emergency Motion to Expedite" the motion to strike. (Dkt. Nos. 132, 133.)

A dismissal under Rule 41(a)(1) is effective on filing, and the Court lacks the authority to disregard it or place a condition on the dismissal. *Com. Space Mgmt. Co. v. Boeing Co.*, 193 F.3d 1074, 1078 (9th Cir. 1999). For these reasons, this action is terminated as to the Corporate Defendants, and the Court STRIKES Defendants' motion to dismiss.

However, the Court does not endorse Plaintiff's efforts to manipulate the litigation process and his blatant gamesmanship. Should Plaintiff continue to dismiss and refile cases in bad faith to obtain a different result, he risks being declared a vexatious litigant in this district.

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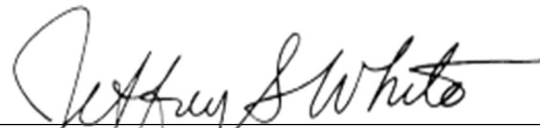
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Finally, the Court STRIKES Plaintiff’s “Emergency Motion to Expedite” for failure to comply with the Civil Local Rules. *See* N.D. Civ. L.R. 6-1.

IT IS SO ORDERED.

Dated: April 12, 2022



JEFFREY S. WHITE
United States District Judge

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID A. STEBBINS,
Plaintiff,

v.

KARL POLANO, et al.,
Defendants.

Case No. 21-cv-04184-JSW

**ORDER GRANTING MOTION TO
INTERVENE, DENYING MOTION
FOR DEFAULT JUDGMENT, AND
DISMISSING ACTION**

Re: Dkt. No. 127, 138

Now before the Court for consideration is the motion to intervene filed by Alphabet, Inc. and YouTube, LLC. The Court has considered the parties' papers, relevant legal authority, and the record in this case, and it finds this matter suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). For the following reasons, the Court GRANTS the motion to intervene, DENIES the motion for default judgment, and DISMISSES the complaint WITH PREJUDICE.

BACKGROUND

Plaintiff David Stebbins ("Plaintiff") asserts copyright infringement claims against defendants Raul Mateas, Karl Polano, and Frederick Allison (collectively, "Individual Defendants"). All three Individual Defendants have defaulted. Plaintiff also initially sued Alphabet, Amazon, and Discord seeking an injunction that would require those entities (the "Corporate Defendants") to ban the Individual Defendants from their services.

Plaintiff alleges the Individual Defendants posted copies of an accidental livestream video on YouTube, Twitch, and Discord. The livestream video at issue was created on April 10, 2021, when Plaintiff's "livestream software turned on of its own accord" unbeknownst to him. (SAC ¶ 22.) The "the only interesting and memorable" thing that occurred during the nearly two-hour "boring and contentless livestream" were "strange noises" that Plaintiff "did not cause." (*Id.*

¶ 23.) Plaintiff registered the livestream with the United States Copyright Office. RJN Ex. A.¹

While Plaintiff pursued his claims in this action, he filed a similar case, *Stebbins v. Rebolo*, 4:22-cv-00546-JSW (the “Related Case”), which alleges additional claims of infringement of the same content.² Plaintiff seeks injunctive relief against the Corporate Defendants in the Related Case. That case is stayed pending final resolution of this matter.

On April 7, 2022, Plaintiff filed a motion for default judgment against the Individual Defendants on April 7, 2022. Plaintiff voluntarily dismissed the Corporate Defendants to prevent them from moving to dismiss his claim and in the hope of obtaining default judgment against the Individual Defendants. The Corporate Defendants moved to intervene to oppose Plaintiff’s motion for default judgment on the basis that they remain defendants in the related action, which also addresses the copyrightability of the livestream. Plaintiff opposes the motion to intervene.³

The Court will address additional facts as necessary in the analysis.

ANALYSIS

A. The Court Grants the Motion to Intervene.

Alphabet and YouTube seek leave to intervene under Federal Rule of Civil Procedure 24(b). Permissive intervention under Rule 24(b) requires “(1) an independent ground for

¹ The Court takes judicial notice of the Plaintiff’s application to register the Accidental Livestream with the United States Copyright Office because it a matter of public record and is not subject to reasonable dispute. *See Lewis v. Activision Blizzard, Inc.*, No. C 12-1096 CW, 2012 WL 5199505, at *1 n.1 (N.D. Cal. Oct. 22, 2012).

² Plaintiff has been deemed a vexatious litigant in the past and numerous courts in districts across the country have dismissed his lawsuits as frivolous and meritless. *See, e.g., Stebbins v. Google, Inc.*, No. 11-CV-03876-LHK, 2011 U.S. Dist. LEXIS 125701 (N.D. Cal. Oct. 27, 2011) (dismissing *sua sponte* as “frivolous” and “clearly baseless”); *Stebbins v. Stebbins*, 575 F. App’x 705, 705 (8th Cir. 2014) (noting it is “undisputed that Stebbins has proceeded in forma pauperis on at least sixteen complaints [as of 2014] that proved meritless, and has filed numerous frivolous motions”); *Stebbins v. Bradford*, No. 3:12-CV-03131, 2013 U.S. Dist. LEXIS 94179 (W.D. Ark. July 5, 2013) (dismissing complaint as frivolous); *Stebbins v. Hixson*, No. 3:18-CV-03040, 2018 U.S. Dist. LEXIS 79361 (W.D. Ark. May 8, 2018); *Stebbins v. Microsoft, Inc.*, No. C11-1362 JCC, 2012 WL 12896360, at *1 (W.D. Wash. Jan. 13, 2012), *aff’d sub nom. Stebbins v. Microsoft Corp.*, 520 F. App’x 589 (9th Cir. 2013); *Stebbins v. Texas*, No. 3:11-CV-2227-N (BK), 2011 U.S. Dist. LEXIS 146248, at *8-9 (N.D. Tex. Oct. 24, 2011).

³ Plaintiff disregarded the Court’s order denying his request to file a supplemental brief in response to the motion to intervene (Dkt. No. 150) and submitted a second request to file a supplemental brief. The Court DENIES the request to file a supplemental brief (Dkt. No. 152) and STRIKES the unauthorized filings at docket numbers 153 and 154.

jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action.” *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1353 (9th Cir.2013). Unlike intervention as of right, “even if all three requirements are satisfied, the district court has discretion to deny permissive intervention.” *SEC v. Small Bus. Capital Corp.*, Civ. No. 5:12–03237 EJD, 2014 WL 3749900, at *2 (N.D. Cal. June 29, 2014). “[P]ractical and equitable considerations play a large role in a court’s decision to grant or deny permissive intervention.” *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, No. 1:12-cv-02182-KJM-KJN, 2016 WL 5847010, at *5 (E.D. Cal. Oct. 6, 2016) (citing *Spangler v. Pasadena City Bd. of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977)). In exercising its discretion, the court must consider whether the intervention would prejudice the parties or delay the litigation, or whether the intervenor would contribute to the development of the facts and the equitable adjudication of the legal questions, are important considerations. *Id.*; see also Fed. R. Civ. P. 24(b)(3). “[T]he court may also consider other factors in the exercise of discretion, including ‘the nature and extent of the intervenors’ interest’ and ‘whether the intervenors’ interests are adequately represented by other parties.’” *Perry v. Proposition 8 Off. Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

Alphabet and YouTube satisfy the threshold factors for permissive intervention. First, the jurisdictional requirement is inapplicable here because this is a federal-question case and Alphabet and YouTube do not raise any new claims. *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) (“the independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims.”). Second, the motion to intervene was timely filed just one week after Plaintiff voluntarily dismissed the Corporate Defendants from the action. Third, the issue of the copyrightability of the livestream is common to this case and the Related Case, in which Alphabet and YouTube are defendants.

Because these factors are satisfied, the decision whether to permit permissive intervention is “committed to the broad discretion of the district court.” *Degamo v. Bank of Am., N.A.*, 849 F. App’x 620, 623 (9th Cir. 2021) (citation omitted). In exercising its discretion to grant or deny permissive intervention, a court must consider whether the intervention will “unduly delay or

prejudice the adjudication of the rights of the original parties.” *Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989), *aff’d sub nom.*, 495 U.S. 82 (1990).

The discretionary considerations favor permissive intervention. Alphabet and YouTube’s interests are not represented in this litigation because the Individual Defendants—the only remaining defendants—have defaulted. Additionally, intervention would not cause undue delay as there are no pending deadlines. Nor will intervention prejudice Plaintiff. Plaintiff asserts intervention would be prejudicial because he voluntarily dismissed Alphabet from this action and permitting intervention would effectively circumvent that dismissal. The Court finds Plaintiff’s argument unpersuasive. YouTube was never named as defendant in this case, and Plaintiff cites no authority for the proposition that Rule 41(a) dismissal prevents permissive intervention Rule 24(b) under these circumstances.

Moreover, permitting intervention “will promote judicial economy and spare the parties from needing to litigate a similar case...” *See California v. Health & Hum. Servs.*, 330 F.R.D. 248, 255 (N.D. Cal. 2019). The copyrightability of the same livestream is at issue in the Related Case. Considering the same issue twice in different cases not only wastes judicial resources, but it could lead to inconsistent results.

Finally, Plaintiff’s behavior in this case favors permissive intervention. Plaintiff has made no secret that he dismissed the Corporate Defendants to prevent them from challenging the validity of the livestream’s copyright and that he intends to re-litigate the same issue in the Related Case. Plaintiff’s abuse of the litigation process and his attempt to evade a ruling on an essential question at the core of both cases, favor intervention.

For these reasons, the Court GRANTS the motion to intervene. YouTube and Alphabet may enter this case as permissive intervenors (the “Intervenors”). The Court will consider the Intervenors’ arguments in opposition to Plaintiff’s motion for default judgment.

B. The Court Denies the Motion for Default Judgment.

Plaintiff has filed a motion for default judgment as to the Individual Defendants. The Intervenors oppose Plaintiff’s motion for default judgment.

Federal Rule of Civil Procedure 55(b)(2) permits a court to enter a final judgment in a case

following a defendant's default. *Shanghai Automation Instrument Co. v. Kuei*, 194 F. Supp. 2d 995, 999 (N.D. Cal. 2001). Whether to enter judgment lies within the court's discretion. *Id.* at 999 (citing *Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir. 1986)). In *Eitel v. McCool*, the Court identified seven factors that district courts may consider in exercising their discretion to award a default judgment:

(1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action [,] (5) the possibility of a dispute concerning material facts [,] (6) whether default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decision on the merits.

782 F.2d 1470, 1471-72 (9th Cir. 1986) (citation omitted). Here, the sufficiency of the complaint and the merits of Plaintiff's substantive claim preclude default judgment.

To state a claim for copyright infringement, Plaintiff must establish he owns a valid copyright in the work at issue. To be copyrightable, the work must be original to the author, which means that it must "possess[] at least some minimal degree of creativity." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (citation omitted). The work also must be the product of human authorship. 17 U.S.C. § 101; *see also* U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 313.2 (3d ed. 2021) ("works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author" are not copyrightable.) Plaintiff cannot establish either element here.

First, the livestream lacks even the minimal degree of creativity required to be copyrightable. Plaintiff alleges that the livestream is "contentless and boring." (SAC ¶ 23.) His recording software ran for two hours capturing Plaintiff's "mundane, daily activities" before Plaintiff noticed and turned it off. (*Id.*) Plaintiff admits that the only notable part of the livestream were "strange noises" that he "did not cause." (*Id.* ¶ 23.) Thus, the allegations establish the creation of the livestream occurred unbeknownst to Plaintiff and without his creative input or direction and thus, is not copyrightable.

Plaintiff's arguments in opposition are unconvincing. First, he asserts that the video

contains acts of creative individual expression, specifically his facial expressions, which he claims suffice to meet the minimum standard for creativity needed for copyright protection. (Opp. ¶¶ 70-73.) Not so. Because Plaintiff did not know he was being recorded, his facial expressions were not creative choices. He also argues that accidental works can be copyrightable. But this situation is not like that in Plaintiff's cited case, where the court found that an unintentional variation in the artist's intended work caused by "bad eyesight or defective musculature, or a shock caused by a clap of thunder" might still constitute creative expression. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 104-105 (2d Cir. 1951). Here, Plaintiff was not engaged in the process of creating an intended work because he the recording occurred without his knowledge.

Accordingly, the livestream does not possess the creativity necessary for it to be copyrightable.

Second, the livestream is not the product of human authorship. Plaintiff himself concedes that his copyright is invalid if the streaming software turned on of its own accord, and that is precisely what he alleges in the complaint. (See SAC ¶ 22; *see also* Dkt. No. 127-20 ¶ 42.) In opposition, Plaintiff contends that his allegations should not be taken literally and that it is "likely that the streaming software turned on as a result of an errant keystroke, rather than purely autonomous means." (Opp. ¶ 20.) Plaintiff's efforts to recast his allegations are unpersuasive. Plaintiff admits he does not know how the streaming software turned which means he cannot plausibly allege that the livestream was the product of human authorship. Regardless, even if the Court accepts Plaintiff's strained "figurative" reading of his allegations, the lack of creativity in the livestream, as discussed above, still dooms his copyright claim.

Finally, Plaintiff asserts that his copyright is presumed valid because he registered it with the United States Copyright Office, which establishes "prima facie evidence of the validity of the copyright." 17 U.S.C. § 410(c). However, "[t]he presumption of the validity of a registered copyright may be overcome by the offer [of] some evidence or proof to dispute or deny the plaintiff's prima facie case of infringement." *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1145 (9th Cir. 2003) (citation omitted); *see also Texkhan, Inc. v. Dress Barn, Inc.*, No. CV 16-4528-MWF(GJSX), 2018 WL 5099729, at *5 (C.D. Cal. Feb. 6, 2018) ("A defendant may rebut the presumption of validity by showing evidence that the certificate of registration contains

inaccurate information that: (1) was included with knowledge that it was inaccurate; and (2) would have caused the Register of Copyrights to refuse registration.”) (citations omitted). Here, Plaintiff’s registration application contained inaccurate and incomplete information: it claimed the livestream was a “Dramatic Work” and did not disclose the circumstances by which the recording occurred. (RJN, Ex. A.) Thus, the allegations in the complaint and evidence in the record overcome the presumption of the validity of the registered copyright.

Plaintiff relies heavily on the earlier screening order in which the Court permitted Plaintiff’s copyright claim to proceed. However, as the Intervenor’s note, at the time the Court screened the complaint, it was not aware that Plaintiff’s registration was based on an inaccurate application. Additionally, because Plaintiff is proceeding *in forma pauperis*, the Court retains the power to dismiss the case at any time if it determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. *See* 28 U.S.C. § 1915(e)(2). Thus, the Court’s earlier screening order does not preclude it from determining at this stage that the complaint fails to state a claim on which relief may be granted.

For these reasons, Plaintiff’s complaint fails to adequately plead a copyright claim. Default judgment is improper, and Plaintiff’s claims are dismissed. *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1393 (9th Cir. 1988) (reversing entry of default judgment where complaint failed to meet pleading standards).

Plaintiff requests leave to amend to correct the deficiencies in his copyright claim. A plaintiff should be permitted leave to amend unless amendment would be futile. *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990). “To determine whether amendment would be futile, courts examine whether the complaint can be amended to cure the defect requiring dismissal ‘without contradicting any of the allegations of [the] original complaint.’” *Kifle v. YouTube LLC*, No. 21-CV-01752-CRB, 2022 WL 1501014, at *2 (N.D. Cal. May 12, 2022) (quoting *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990)). The Court finds amendment would be futile. Plaintiff’s allegations and admissions regarding the circumstances surrounding the creation of the livestream are fatal to his copyright claim. There are no facts Plaintiff could allege to save his deficient claim that would not impermissibly

contradict his original pleadings. For this reason, amendment is futile.

Plaintiff clearly feels aggrieved by comments made about him online by the Individual Defendants and others, but that does not mean Plaintiff has a viable copyright claim. He does not, and his pursuit of his claim has caused the Court to expend significant resources addressing his meritless claims. Plaintiff is warned that if he persists in filing frivolous or meritless lawsuits, the Court may impose sanctions, bar from him from filing further actions without prior approval, and/or deem him a vexatious litigant.

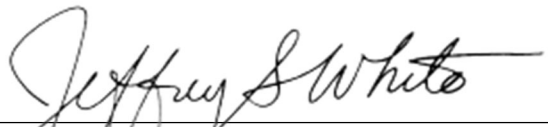
CONCLUSION

For the foregoing reasons, the Court GRANTS the motion to intervene (Dkt. No. 138), DENIES the motion for default judgment (Dkt. No. 127), and DISMISSES the case WITH PREJUDICE.

The Clerk shall terminate any pending motions as moot and close the file.

IT IS SO ORDERED.

Dated: July 11, 2022


JEFFREY S. WHITE
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID A. STEBBINS,

Plaintiff,

v.

EMILY REBOLO, et al.,

Defendants.

Case No. 22-cv-00546-JSW

**ORDER LIFTING STAY, SCREENING
COMPLAINT, AND DISMISSING
CASE**

Re: Dkt. Nos. 8, 14

On February 23, 2022, the Court issued an order staying this case pending resolution of *Stebbins v. Polano*, 4:21-cv-4184-JSW (the “Related Case”). (See Dkt. No. 14.) On July 7, 2022, the Court issued an order dismissing the Related Case. Now that the Related Case is resolved, the Court HEREBY LIFTS THE STAY.

The original complaint was filed on January 27, 2022, and the matter was randomly assigned to Magistrate Judge Kim. On February 3, 2022, Judge Kim granted Plaintiff’s request to proceed *in forma pauperis* but ordered a hold on service while the motion to relate this matter to *Stebbins v. Polano* was decided. (Dkt. No. 8.) The cases were related, and this matter was reassigned to the undersigned. (Dkt. Nos. 9-10.) Shortly thereafter, the Court stayed the case pending resolution of the Related Case because a ruling in that case “will be relevant and potentially fully dispositive in the present case.” (Dkt. No. 14.) Now that the stay is lifted and because Plaintiff is proceeding *in forma pauperis*, the Court must screen Plaintiff’s complaint under 28 U.S.C. section 1915 (“Section 1915”).

Under Section 1915(e)(2)(B), the Court must dismiss an *in forma pauperis* action if the Court finds that the action “fails to state a claim on which relief may be granted” or that the action is “frivolous or malicious.” 28 U.S.C. § 1915(e)(2)(B); *see also Neitzke v. Williams*, 490 U.S.

319, 324 (1989). Section 1915(e)(2) parallels the language of Federal Rules of Civil Procedure 12(b)(6) regarding dismissals for failure to state a claim. *See* 28 U.S.C. § 1915(e)(2); *see also* *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000). The complaint therefore must allege facts that plausibly establish each defendant’s liability. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint is “frivolous” where it lacks an arguable basis either in law or in fact. *Neitzke*, 490 U.S. at 325 (definition of “frivolous . . . embraces not only the arguable legal conclusion, but also the fanciful factual allegation”). As the United States Supreme Court has explained:

[the *in forma pauperis* statute] is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit . . . [It affords] judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to *pierce the veil of the complaint’s factual allegations and dismiss those claims whose factual contentions are clearly baseless*.

Neitzke, 490 U.S. at 327-28 (emphasis added). “Dismissals on these grounds are often made *sua sponte* prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints.” *Id.* at 324.

Plaintiff brings this complaint about the infringement of several purportedly copyrighted works. (*See* FAC ¶¶ 19-39.) “To establish to establish infringement of a copyright, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publications, Inc. v. Rural Tel. Serv., Co.*, 499 U.S. 340, 361 (1991).

Plaintiff’s claims based on infringement of the April 10, 2021 livestream are dismissed with prejudice. The Court dismissed, with prejudice, Plaintiff’s claims based on this livestream in the Related Case, *Stebbins v. Polano*, 4:21-cv-4184-JSW, on the basis that the livestream lacks creativity and human authorship because the recording occurred unbeknownst to Plaintiff. (*See* Related Case, Dkt. No. 157.) For this reason, the copyright infringement claims based on the April 10, 2021 livestream are dismissed, with prejudice, for failure to state a claim.

1 Plaintiff also brings copyright infringement claims against several defendants based on the
2 use of ten 2D images. (FAC ¶¶ 33-39.) The U.S. Copyright Office rejected Plaintiff's request to
3 register the images for copyright protection because they are "basic geometric shapes," which lack
4 sufficient creativity and human authorship for copyright protection lacked sufficient creativity.
5 (*Id.* ¶¶ 39, 161.) Based on the Copyright Office's refusal, Plaintiff does not have a presumption of
6 validity over the 2D images.

7 Furthermore, Plaintiff's allegations fall short of establishing the copyrightability of the 2D
8 images. As described in the complaint, the images are a "blue honeycomb background"
9 comprised of hexagons. (*Id.* ¶ 161.) But as the U.S. Copyright Office found, there is no copyright
10 protection for basic geometric shapes. Nevertheless, Plaintiff alleges the images meet the standard
11 for creativity because he put the "hexagons in a honeycomb pattern with a gradient [sic] color
12 scheme." (*Id.*) As alleged, the Court concludes that there is an insufficient degree of creativity in
13 the arrangement and selection of the hexagons to qualify for copyright protection. For this reason,
14 the Court dismisses the copyright infringement claims based on the ten 2D images.

15 Finally, Plaintiff asserts additional copyright infringement claims based on the alleged
16 copying of other livestream videos. (*See* FAC ¶¶ 26-32.) Plaintiff registered these livestreams
17 with the U.S. Copyright Office. (*See id.* ¶¶ 27-28, 30, 32.) Although registration constitutes
18 "prima facie evidence of the validity of the copyright," the presumption of validity may be
19 overcome by some evidence or proof to dispute or deny the plaintiff's prima facie case of
20 infringement. *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1145 (9th Cir.
21 2003) (citation omitted); *see also Neitzke*, 490 U.S. at 327 ("[Section 1915] accords judges...the
22 unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims
23 whose factual contentions are clearly baseless.").

24 Here, the Court has sufficient evidence to dispute the presumption of validity afforded by
25 registration. In the Related Case, the record showed that Plaintiff did not disclose the true nature
26 and circumstances of the April 10, 2021 livestream video to the U.S. Copyright Office in his
27 registration application. (*See* Related Case, Dkt. Nos. 138, 157.) Thus, although Plaintiff
28 obtained a certificate of registration for that livestream, the Court found this evidence rebutted the

1 presumption of validity, and upon examination of the allegations in the complaint, determined the
2 April 10, 2021 was not copyrightable. (*Id.*, Dkt. No. 157.) The Court finds that Plaintiff's proven
3 lack of candor in his prior application overcomes the presumption of validity afforded by
4 registration of the other livestream videos.

5 Without the presumption of validity, Plaintiff's allegations of ownership regarding the
6 additional livestreams are insufficient. Plaintiff does not allege facts that permit the Court to
7 assess whether the content is eligible for copyright protection. He does not describe the material
8 or address how it meets any of the criteria for copyright protection, such as creativity or
9 originality. Moreover, his allegations of copying are vague and conclusory. Accordingly,
10 Plaintiff fails to allege a viable infringement claim as to the remaining livestream videos.

11 Although the Court "should freely give leave [to amend] when justice so requires[,]” it is
12 within the court's discretion to deny such leave to amend when there has been “undue delay, bad
13 faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by
14 amendments previously allowed, undue prejudice for the opposing party by virtue of allowance of
15 the amendment, futility of amendment, etc.” *Forman v. Davis*, 371 U.S. 178, 182 (1962).

16 Here, the Court finds several factors support dismissal without leave to amend. Plaintiff
17 has already been afforded multiple bites at the apple. Plaintiff pursued similar and overlapping
18 infringement claims in the Related Case, which has now been dismissed with prejudice.
19 Additionally, Plaintiff already amended the complaint in this action once and sought leave to file a
20 second amended complaint.¹ Neither the amended complaint nor the proposed second amended
21 complaint contain additional facts that save Plaintiff's deficient claims or suggest that such facts
22 exist. Indeed, much of the alleged infringement is plainly fair use criticism as Plaintiff himself
23 concedes in the complaint. Thus, amendment would be futile.

24 Finally, Plaintiff's attempt to manufacture and pursue ultimately meritless copyright
25 infringement claims in an effort to silence online criticism smacks of bad faith and abuse of the
26 Court system. Plaintiff's bad faith and his history of filing frivolous lawsuits further justifies

27
28 ¹ Plaintiff filed a first amended complaint on March 8, 2022. (Dkt. No. 15.) He filed a motion for
leave to file a second amended complaint on April 27, 2022. (Dkt. No. 16.)

1 dismissal without leave to amend.² For these reasons, the dismissal is WITHOUT LEAVE TO
2 AMEND.

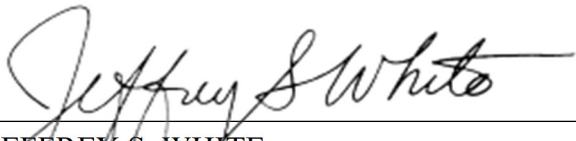
3 Plaintiff is warned that if he persists in filing frivolous or meritless lawsuits, the Court may
4 impose sanctions, bar from him from filing further actions without prior approval, and/or deem
5 him a vexatious litigant.

6 **CONCLUSION**

7 The complaint is DISMISSED WITHOUT LEAVE TO AMEND. The Clerk shall
8 terminate any pending motions as moot and close the file.

9 **IT IS SO ORDERED.**

10 Dated: July 11, 2022

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12 JEFFREY S. WHITE
13 United States District Judge
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23 ² See, e.g., *Stebbins v. Google, Inc.*, No. 11-CV-03876-LHK, 2011 U.S. Dist. LEXIS 125701
24 (N.D. Cal. Oct. 27, 2011) (dismissing *sua sponte* as “frivolous” and “clearly baseless”); *Stebbins*
25 *v. Stebbins*, 575 F. App’x 705, 705 (8th Cir. 2014) (noting it is “undisputed that Stebbins has
26 proceeded in forma pauperis on at least sixteen complaints [as of 2014] that proved meritless, and
27 has filed numerous frivolous motions”); *Stebbins v. Bradford*, No. 3:12-CV-03131, 2013 U.S.
28 Dist. LEXIS 94179 (W.D. Ark. July 5, 2013) (dismissing complaint as frivolous); *Stebbins v.*
Hixson, No. 3:18-CV-03040, 2018 U.S. Dist. LEXIS 79361 (W.D. Ark. May 8, 2018);
Stebbins v. Microsoft, Inc., No. C11-1362 JCC, 2012 WL 12896360, at *1 (W.D. Wash. Jan. 13,
2012), *aff’d sub nom. Stebbins v. Microsoft Corp.*, 520 F. App’x 589 (9th Cir. 2013); *Stebbins v.*
Texas, No. 3:11-CV-2227-N (BK), 2011 U.S. Dist. LEXIS 146248, at *8-9 (N.D. Tex. Oct. 24,
2011).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID A. STEBBINS,

Plaintiff,

v.

KARL POLANO, et al.,

Defendants.

Case No. 21-cv-04184-JSW

**ORDER DENYING MOTION FOR
RECONSIDERATION AND RECUSAL
AND DENYING MOTION FOR
RELIEF FROM JUDGMENT**

Re: Dkt. Nos. 159, 162, 165

Now before the Court for consideration are the motion for reconsideration and recusal and motion for relief from judgment filed by Plaintiff David Stebbins (“Plaintiff”). The Court has considered the parties’ papers, relevant legal authority, and the record in this case, and it finds the motion suitable for disposition without oral argument.¹ See N.D. Civ. L.R. 7-1(b). For the following reasons, the Court DENIES Plaintiff’s motions.

BACKGROUND

On July 11, 2022, this Court issued an order denying Plaintiff’s motion for default judgment and dismissing the action. That same day, before the Court entered judgment, Plaintiff filed a motion requesting leave to file a motion for reconsideration. The Court entered judgment on July 11, 2022. Plaintiff subsequently filed a motion to set aside judgment pursuant to Federal Rule of Civil Procedure 60(b). In his motions, Plaintiff moves the Court to reconsider its order dismissing the case for five reasons: (1) the Court erred in permitting intervention by Alphabet and YouTube; (2) the Court erred in finding the work showed minimal creativity; (3) the Court improperly considered certain “inadmissible” allegations in the SAC in finding the work lacked

¹ The Court also considered Plaintiff’s supplemental filing in support of both motions. (See Dkt. No. 165.)

human authorship; (4) the Court ignored evidence that showed the Copyright Office was aware of errors in his registration application; and (5) the Court failed to adjudicate the claim for misrepresentation under 512(f)(1).

The Court will address additional facts as necessary in the analysis.

ANALYSIS

A. The Court Denies Plaintiff's Motion for Reconsideration.

Under Local Rule 7-9(b), reconsideration may be sought only if one of the following circumstances exists: (1) a material difference in fact or law from that presented to the Court prior to issuance of the order that is the subject of the motion for reconsideration; (2) new material facts or a change of law occurring after issuance of such order; or (3) a manifest failure by the Court to consider material facts or dispositive legal arguments that were presented to the Court before issuance of such order. N.D. Civ. L.R. 7-9(b)(1)-(3). In addition, a party seeking leave to file a motion for reconsideration may not reargue any written or oral argument previously asserted to the Court. Civ. L.R. 7-9(c); *see also United States v. Hector*, 368 F. Supp. 2d 1060, 1063 (C.D. Cal. 2005), *rev'd on other grounds*, 474 F.3d 1150 (9th Cir. 2007) (“A motion for reconsideration is not to be used as a means to reargue a case or to ask a court to rethink a decision it has made.”).

Plaintiff brings his motion pursuant to Local Rule 7-9(b)(3), asserting manifest failure to consider material facts or dispositive legal arguments presented to the Court. Plaintiff seeks reconsideration of five aspects of the Court's order dismissing this action. First, Plaintiff asserts that the Court erred in permitting Alphabet and YouTube to intervene, which circumvented Plaintiff's earlier voluntary dismissal of the Corporate Defendants. Second, Plaintiff asserts that the Court erred in finding the work showed minimal creativity. Third, Plaintiff contends that in finding the work lacked human authorship, the Court improperly considered certain “inadmissible” allegations in the SAC. Fourth, Plaintiff contends that the Court ignored evidence that showed the Copyright Office was aware of errors in his registration application and still granted registration. Fifth, Plaintiff asserts that the Court failed to adjudicate the claim for misrepresentation under 512(f)(1) which he asserted against one of the individual defendants, Raul Mateas (“Mateas”). The Court finds Plaintiff's arguments unavailing for the reasons below and

concludes that he has not shown that reconsideration is warranted under Civil Local Rule 7-9.

Plaintiff first argues that the Court erred in permitting Alphabet and YouTube to intervene because it circumvented his earlier voluntary dismissal of Alphabet and Amazon. The Court already considered and rejected this argument in its order dismissing the action and thus it is improper under the Local Rule's prohibition against repeating previous arguments. *See* N.D. Civ. L.R. 7-9(c).²

Plaintiff's second and third arguments for reconsideration challenge the Court's conclusions regarding the creativity and human authorship of his livestream video. The Court considered and rejected Plaintiff's arguments regarding these elements in its order dismissing the case. Thus, Plaintiff's motion for reconsideration improperly attempts to reargue issues already presented to and decided by the Court. As the Court explained in the order dismissing the case, the SAC establishes that the livestream does not contain the minimal creativity required to be copyrightable and lacks human authorship. These allegations are fatal to Plaintiff's copyright claims related to the livestream. Plaintiff cannot now recast his allegations as "inadmissible hearsay" or use his motion for reconsideration as an attempt to amend his complaint. As the Court explained in its prior order, Plaintiff could not amend this complaint to cure these fatal defects without impermissibly contradicting his original allegations that the software turned on of its own accord and was "contentless and boring." *See Weilbeurg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007) (dismissal of a pro se complaint with prejudice is proper where it is "absolute clear" that the deficiencies in the complaint could not be cured by amendment).

Fourth, Plaintiff argues reconsideration is warranted because the Court failed to consider

² Even if this were not the case, the additional cases Plaintiff now cites do not support reconsideration. *See Fort Sill Apache Tribe of Oklahoma v. United States*, No. CIV-08-0541-F, 2008 WL 2891654 (W.D. Okla. July 23, 2008); *Dukes v. Wal-Mart Stores, Inc.*, No. 01-CV-02252-CRB, 2016 WL 4269093 (N.D. Cal. Aug. 15, 2016). Those cases stand for the proposition that a court loses jurisdiction to entertain a motion to intervene once a case is dismissed pursuant to Rule 41(a)(1) because there is no longer a pending case or controversy. Here, in contrast, Plaintiff's voluntary dismissal of Alphabet and Amazon did not terminate the action because the claims against the individual defendants remained. Thus, the Court retained jurisdiction over the ongoing case into which a non-party could intervene. Finally, even if the Court credited Plaintiff's argument, it would not alter the outcome as to YouTube who was not named in this action prior to seeking to intervene.

evidence regarding his classification of the accidental livestream as a “dramatic work.” Plaintiff does not provide a citation to the evidence he claims the Court failed to consider. On review of Plaintiff’s filing, it appears that Plaintiff may be referring to his request for judicial notice of the assertion that the Copyright Office required him to upload a copy of his work. (*See* Dkt. No. 144-1 at ¶ 1.) However, Plaintiff’s assertion is not proper for judicial notice. To be entitled to judicial notice of a fact under Federal Rule of Evidence 201, Plaintiff must establish that the fact is not subject to reasonable dispute and is capable of immediate and accurate determination by resort to a source that cannot be reasonably questioned. Plaintiff’s conclusory request for judicial notice did not satisfy either factor, and he did not supply the Court with any source material to determine if his request was justified. To the extent this is the evidence Plaintiff claims the Court failed to consider, reconsideration is not warranted on this basis.

Finally, Plaintiff asserts that reconsideration is warranted because the Court’s order did not address his claim for misrepresentation against one of the individual defendants, Raul Mateas (“Mateas”) pursuant to 17 U.S.C. section 512(f) (“Section 512(f”).

Plaintiff is correct that the Court did not expressly address Plaintiff’s request for default judgment on this claim in its order dismissing the action. However, the Court has carefully reviewed Plaintiff’s motion for default judgment and for the reasons discussed below, Plaintiff is not entitled to default judgment against Mateas on this claim.

A defendant’s default does not automatically entitle the plaintiff to a court-ordered judgment. *See Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir.1986). Rather, granting or denying relief is entirely within the court’s discretion. *See id.* The Ninth Circuit has enumerated the following factors (collectively, the *Eitel* factors) that a court may consider in determining whether to grant default judgment: (1) the merits of the plaintiff’s substantive claim; (2) the sufficiency of the complaint; (3) the sum of money at stake in the action; (4) the possibility of prejudice to the plaintiff; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decision on the merits. *See Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir.1986).

1 Upon entry of default, the well-pleaded allegations of the complaint relating to a
2 defendant's liability are taken as true, except for allegations as to the amount of damages. *See*
3 *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir.1987). Further, "necessary
4 facts not contained in the pleadings, and claims which are legally insufficient, are not established
5 by default." *Id.* (citing *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978)).

6 Here, after considering the *Eitel* factors, the Court finds in its discretion that granting
7 default judgment against Mateas as to the misrepresentation claim is not warranted. In particular,
8 the first and second *Eitel* factors, which analyze the substantive merits of Plaintiff's claim and the
9 sufficiency of the complaint, do not favor default judgment. Under Section 512(f)(1), "[a]ny
10 person who knowingly materially misrepresents...that material or activity is infringing...shall be
11 liable for any damages...incurred by the alleged infringer...who is injured by such
12 misrepresentation, as the result of the service provider relying upon such misrepresentation in
13 removing or disabling access to the material." 17 U.S.C. § 512(f). Thus, a plaintiff must allege
14 that the defendant "knowingly and materially misrepresent[ed] that copyright infringement ...
15 occurred." *Online Policy Group v. Diebold*, 337 F. Supp. 1195, 1204 (N.D. Cal. 2004). However,
16 "[a] copyright owner cannot be liable simply because an unknowing mistake is made, even if the
17 copyright owner acted unreasonably in making the mistake." *Rossi v. MPAA*, 391 F.3d 1000,
18 1004 (9th Cir. 2004); *see also Arista Records v. MP3Board*, 00 Civ. 4660 (SHS), 2002 WL
19 1997918, at *15 (S.D.N.Y. Aug. 29, 2002).

20 Plaintiff alleges that on May 25, 2021, he posted a video to YouTube in which he
21 displayed a screenshot that included Mateas' Discord icon. (SAC ¶ 53.) Plaintiff alleges that
22 Mateas issued a fraudulent takedown notice, and YouTube removed the video. (*Id.* ¶ 54.)
23 Plaintiff alleges Mateas "does not own the copyright" to the allegedly infringing picture and
24 "probably just pulled it off the Internet." (*Id.*) Plaintiff further alleges "[n]o reasonable person
25 could...reasonably determined [sic] that [his] use of the screenshot was not fair use." (*Id.* ¶ 55.)
26 Plaintiff issued a counter-notification, and YouTube reinstated the video by June 13, 2021. (*Id.* ¶
27 56.) The video was removed for nineteen days. (*Id.*) Plaintiff alleges during this time "it was not
28 getting views and thus not getting ad revenue." (*Id.*)

Plaintiff's allegations lack sufficient specificity to state a claim for misrepresentation. Plaintiff offers only conclusory assertions; he does not allege facts which identify how or why Mateas knew or should have known that the material was non-infringing. Plaintiff claims that he is entitled to default judgment on this claim because his allegations are deemed true. (*See* Dkt. No. 127-20, ¶ 26.) However, on default judgment, a defendant "is not held to facts that are not well-pleaded or to admit conclusions of law." *Wecosign, Inc. v. IFG Holdings, Inc.*, 845 F. Supp. 2d 1072, 1078 (C.D. Cal. 2012). Plaintiff's conclusory allegations not well-pleaded, and are thus insufficient to establish a claim for misrepresentation.

Additionally, Plaintiff has not established he suffered damages because of the misrepresentation. Plaintiff alleges he lost views and ad revenue while the video was taken down. However, at default judgment, a plaintiff must offer evidence of the amount of damages suffered. *TeleVideo Systems, Inc.*, 826 F.2d at 917-18 ("The general rule of law is that upon default the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true."); *see also PepsiCo, Inc. v. California Sec. Cans*, 238 F. Supp. 2d 1172, 1174-75 (C.D. Cal. 2002) ("[T]he plaintiff is required to provide proof of all damages sought in the complaint."). In his motion for default judgment, Plaintiff does not address the damages element of his misrepresentation claim and his conclusory allegations are insufficient to establish that the alleged misrepresentation caused him damage. *See Lenz v. Universal Music Corp.*, No. C 07-3783 JF, 2010 WL 702466, at *10 (N.D. Cal. Feb. 25, 2010) (Section 512(f) damages "must be proximately caused by the misrepresentation"). For these reasons, the first and second *Eitel* factors do not weigh in favor of default judgment.

The third *Eitel* factor requires the Court to consider the amount of money at stake in relation to the seriousness of Defendant's conduct. *See Eitel*, 782 F.2d at 1471. "Default judgment is disfavored when a large amount of money is involved or is unreasonable in light of the defendant's actions." *Valentin v. Grant Mercantile Agency, Inc.*, No. 1:17-cv-01019-AWI-SKO, 2017 WL 6604410, at *7 (E.D. Cal. Dec. 27, 2017) (internal citation omitted). In his motion for default judgment, Plaintiff seeks damages in the amount of \$1,800,000 from the Individual Defendants. This is a substantial amount of money. Moreover, it is unreasonable given

that the video at issue in the misrepresentation claim was reinstated after being down for a relatively short time. The Court finds this factor weighs against granting default judgment.

The fourth factor, which considers the possibility of prejudice to Plaintiff, also does not weigh in favor of default judgment. Despite Mateas' failure to appear and defend himself in this action, Plaintiff has not shown that he will be prejudiced if default judgment on the misrepresentation claim is not granted. The video underlying this claim has been restored and as discussed above, Plaintiff has shown that he suffered damages from the alleged misrepresentation. Finally, the strong policy favoring decisions on the merits also weighs against default judgment. On balance, the Court concludes that the *Eitel* factors do not favor default judgment against Mateas on Plaintiff's Section 512(f) claim.

Accordingly, Plaintiff has failed to show that reconsideration is warranted, and the Court DENIES his motion.

B. Plaintiff is Not Entitled to Relief Under Rule 60(b)(6).

Plaintiff has also filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6), which provides that a court may provide relief from judgment for "any other reason that justifies relief." Rule 60(b)(6) is to be used "sparingly as an equitable remedy to prevent manifest injustice." *Lal v. California*, 610 F.3d 518, 524 (9th Cir. 2010) (quoting *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)). "To receive relief under Rule 60(b)(6), a party must demonstrate extraordinary circumstances which prevented or rendered [her] unable to prosecute" her case. *Id.* (citation and internal quotation marks omitted). A party seeking relief under this Rule "must demonstrate both injury and circumstances beyond [her] control that prevented [her] from proceeding with the prosecution or defense of the action in a proper fashion." *Cnty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002).

Plaintiff argues that judgment should be set aside under Rule 60(b)(6) for the same reasons identified in his motion for reconsideration. However, Rule 60(b)(6) is not intended to redress error on the part of the district court, or to provide a party a substitute for an appeal. *Evans v. Woodford*, No. 1:06-cv-01250-ALA(P), 2008 WL 5114653, at *1 (E.D. Cal. Dec. 4, 2008) (quoting *Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir. 1981)).

Because Rule 60(b)(6) is not a basis for relief here, the Court DENIES Plaintiff's motion.

C. Plaintiff's Request for Recusal is Denied.

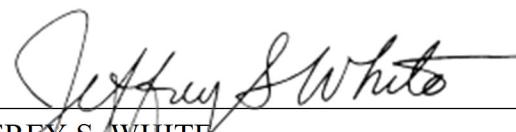
Plaintiff asserts that the Court should recuse itself if it decides to re-open the case on the basis that the Court holds a personal grudge against Plaintiff based on his behavior and dismissed the case to punish him for his "abusive behavior." Because Plaintiff has not shown that reconsideration or relief from judgment is warranted, the request for recusal is moot. In any event, 28 U.S.C. section 455(a) "require[s] recusal only if the bias or prejudice stem from an extrajudicial source and not from conduct or rulings made during the course of the proceeding." *Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381, 1388 (9th Cir. 1988). Judges are presumed to be impartial and, accordingly, parties seeking recusal bear "the substantial burden of proving otherwise." *United States v. Dehghani*, 550 F.3d 716, 721 (8th Cir.2008) (internal quotation marks and citation omitted). Here, Plaintiff seeks recusal based on this Court's rulings, but an adverse judicial ruling is not an adequate basis for recusal. *Litkey v. United States*, 510 U.S. 540, 549 (1994); *Leslie v. Grupo ICA*, 198 F.3d 1152, 1160 (9th Cir. 1999). Plaintiff's request for recusal is DENIED.

CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiffs' motion for reconsideration, motion for relief from judgment, and motion for recusal.

IT IS SO ORDERED.

Dated: March 28, 2023


 JEFFREY S. WHITE
 United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID A. STEBBINS,
Plaintiff,
v.
KARL POLANO, et al.,
Defendants.

Case No. 21-cv-04184-JSW

**ORDER RE SUFFICIENCY OF
AMENDED COMPLAINT AND
DEFERRING RULING ON EX PARTE
APPLICATION FOR TEMPORARY
RESTRAINING ORDER**

Now before the Court is an ex parte application for a temporary restraining order (“TRO”) filed by Plaintiff David Stebbins (“Plaintiff”) against a single named defendant, Discord, Inc., requiring Discord, Inc., to prohibit certain of its members from managing channels or messages. In making a determination regarding Plaintiff’s application, the Court has reviewed the procedural posture of this case.

The original complaint was filed on June 2, 2021, and the matter was randomly assigned to Magistrate Judge Corley. On June 30, 2021, Judge Corley issued a screening order pursuant to 28 U.S.C. section 1915. (Dkt. No. 10.) In that Order, Judge Corley found that Plaintiff sufficiently stated a claim for copyright infringement but found that Plaintiff’s claims for misrepresentation under 17 U.S.C. section 512(f) (“Section 512(f)”) and intentional infliction of emotional distress (“IIED”) failed to comply with Federal Rule of Civil Procedure 8. She permitted Plaintiff leave to amend to cure the defects identified by no later than July 30, 2021. On July 29, 2021, Plaintiff filed an amended complaint. (Dkt. No. 11.) That same day, he filed an ex parte application for a TRO, and the case was subsequently reassigned to the undersigned. (Dkt. No. 20.) Before the Court may address the TRO, it must first address the sufficiency of the amended complaint’s allegations under 28 U.S.C. section 1915.

BACKGROUND

Plaintiff posts content to his YouTube and Twitch channels using the alias Acerthorn. (Am. Compl. ¶ 1.) Plaintiff alleges that on April 10, 2021, his livestream software turned on causing him to inadvertently broadcast two hours of his daily activities for his viewers to see. (*Id.* ¶ 22.) Plaintiff alleges that at one point in the video, strange noises can be heard. (*Id.* ¶ 23.) The noises constitute the most interesting and memorable part of the livestream. (*Id.*) Plaintiff alleges that he registered his accidental livestream with the U.S. Copyright Office and uploaded a video of the livestream to his YouTube channel, limiting access to those who pay him twenty dollars per month. (*Id.* ¶ 24.)

Plaintiff alleges that shortly after his inadvertent livestream, a user with the alias InitiativeKookie uploaded a clip from the accidental livestream to YouTube and Vimeo on multiple occasions despite receiving takedown notices from Plaintiff. (*Id.* ¶¶ 26-32.) Plaintiff alleges that on April 25, 2021, he learned that Defendant Polano was also sharing Plaintiff's copyrighted livestreams on Polano's Discord server. (*Id.* ¶ 38.) Plaintiff alleges that Polano's Discord server is moderated by a user with the alias TGP482. (*Id.* ¶ 40.) Plaintiff alleges that Polano and TGP482 refused to remove the infringing content. As a result of these instances of infringement, Plaintiff alleges that he has issued numerous takedown notices.

Plaintiff alleges that on May 20, 2021, Defendant Polano posted a video to his YouTube channel that consisted of a clip of Plaintiff's accidental livestream combined with some additional video clips. (*Id.* ¶ 45.) Plaintiff filed a takedown notice with YouTube, and the video was removed. (*Id.* ¶ 46.) Plaintiff alleges that Polano filed a counter-notification stating that the video was a parody and fair use. (*Id.* ¶ 47.) Plaintiff alleges that TGP482 and Polano uploaded a clip of his accidental livestream to Instagram on June 9, 2021. (*Id.* ¶ 57.) Although Plaintiff filed a takedown notice, Facebook did not remove the material. (*Id.* ¶ 58.) Plaintiff alleges that the video could have only been obtained by illegally downloading it. (*Id.* ¶ 81.)

Plaintiff brings claims for copyright infringement, violations of 17 U.S.C. section 512(f)(2) against Polano; violation of 17 U.S.C. section 512(f)(1) against TGP482; and IIED.

The Court will address additional facts as necessary in the analysis.

ANALYSIS

A. Copyright Infringement Claims.

To state a claim for copyright infringement, a plaintiff must allege facts plausibly showing (1) that he owns a valid copyright in the work, and (2) “copying” and “unlawful appropriation.” *Skidmore for Randy Craig Wolfe Trust v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc). For “copying,” the alleged facts must plausibly show, directly, that the defendant copied or, circumstantially, that the defendant had access to the plaintiff’s work and the works are strikingly similar. *Id.* For “unlawful appropriation,” the alleged facts must plausibly show that specific elements of the works are objectively similar and that an ordinary observer would view the overall works as similar. *Id.* Here, as Judge Corley previously noted, Plaintiff’s allegations plausibly allege a claim of copyright infringement.

B. Misrepresentation Under 17 U.S.C. Section 512(f).

1. Section 512(f)(1) Claim.

Plaintiff has added a claim for a violation of Section 512(f)(1) alleging that a user with the alias TGP482 issued a fraudulent takedown notice against a video Plaintiff posted on YouTube because Plaintiff used an image of TGP482’s Discord user icon in the video. (Am. Compl. ¶ 54.). Under section 512(f), a copyright owner may be liable for damages if it does not make a good-faith assertion in its takedown notice that the subject material infringes on its copyright. A copyright owner “who knowingly materially misrepresents ... that the material or activity is infringing ... shall be liable for damages incurred by the alleged infringer[.]” 17 U.S.C. § 512(f); *see also Online Policy Group v. Diebold, Inc.*, 337 F.Supp.2d 1195, 1204 (N.D. Cal. 2004) (“A party is liable if it ‘knowingly’ and ‘materially’ misrepresents that copyright infringement has occurred.”).

Here, Plaintiff alleges that the TGP482 knowingly misrepresented that infringement occurred because he does not own the copyright to the picture. Plaintiff also alleges that he received notice that members of a certain Discord server, which he alleges includes TGP482, intended to make “false copyright strikes in retaliation” for Plaintiff’s takedown notice against Polano. (See Am. Compl. ¶ 46.) Plaintiff also alleges that TGP482 failed to consider fair use

1 prior to issuing the takedown notice. Finally, Plaintiff alleges that he suffered injury in the form
2 of lost views and lost ad revenue. While sparse, the Court finds these allegations sufficient at the
3 pleading stage. *Lenz*, 572 F. Supp. 2d at 1156-57. Although the Court is skeptical that Plaintiff
4 will be able to prove that TGP482 acted with subjective bad faith, at this stage, it finds the
5 allegations sufficient to survive Section 1915 review.

6 2. Section 512(f)(2) Claim.

7 To state a claim for misrepresentation under Section 512(f)(2), a plaintiff must allege facts
8 plausibly showing (1) that the defendant knowingly and materially misrepresented that its material
9 was removed or disabled by mistake or misidentification; (2) the internet service provider relied
10 on the misrepresentation in replacing the removed material or ceasing to disable access to it; and
11 (3) the plaintiff was injured as a result. *See Automattic Inc. v. Steiner*, 82 F. Supp. 3d 1011, 1026
12 (N.D. Cal. 2015). The first element is not met if the defendant had a subjective good faith belief
13 that it was not making a misrepresentation—in this situation, if the defendant had a subjective
14 good faith belief that its material was fair use and therefore removing it was a misidentification.
15 *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1153-54 (N.D. Cal. 2008). Judge Corley
16 found that Plaintiff failed to adequately plead the first element because the facts as alleged do not
17 plausibly suggest that any misrepresentation in Defendant Polano's counter-notice was knowing.

18 Plaintiff has failed to cure this defect in the amended complaint. Plaintiff still does not
19 plausibly allege that Polano knowingly misrepresented in the counter-notice that his video was fair
20 use and intended for parody. Indeed, Plaintiff alleges that Polano's video used only a portion of
21 his original livestream and added certain new elements to the video. Plaintiff also alleges that
22 Polano sent him a message in which he implies that his use of Plaintiff's video was fair use. (*See*
23 *Am. Compl.* ¶ 38(e)). Plaintiff asserts that Polano's video is not a parody and has not been
24 sufficiently transformed; however, the relevant question for Plaintiff's claim of misrepresentation
25 is whether Plaintiff has adequately alleged that Polano lacked a good faith subjective belief that
26 his use of Plaintiff's video was fair use. He has failed to do so, and in fact, his allegations give
27 rise to the opposite inference. Accordingly, the allegations of the amended complaint give rise to
28 the inference that Polano had a subjective good faith belief that his use of the video was fair use.

Based on Plaintiff's allegations, it is implausible to infer that Polano knowingly misrepresented that his use of the video was fair use. Plaintiff's allegations are insufficient to state a claim for relief under Section 512(f)(2). Moreover, the Court finds further leave to amend here would be futile given the allegations in the complaint establishing Polano's subjective good faith belief. Accordingly, this claim is dismissed WITH PREJUDICE.

C. Intentional Infliction of Emotional Distress.

To state claim for IIED a plaintiff must show: (1) extreme and outrageous conduct by the defendant with the intention to cause, or reckless disregard of the probability of causing, emotional distress; (2) suffering of severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress. *Hughes v. Pair*, 46 Cal. 4th 1035, 1050 (2009). Courts have emphasized that extreme and outrageous conduct is conduct that "go[es] beyond all possible [bounds] of decency, and [is] regarded as atrocious, and utterly intolerable in a civilized community." *Mintz v. Blue Cross of Cal.*, 172 Cal. App. 4th 1594, 1608 (2009) (quotation omitted). "With respect to the requirement that the plaintiff show severe emotional distress [for an IIED claim]," the California Supreme Court "has set a high bar." *Hughes*, 46 Cal. 4th at 1051. "Severe emotional distress means emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." *Id.* (citation and internal quotation marks omitted).

Plaintiff's allegations are insufficient to state a claim for IIED. As in the original complaint, the amended complaint again fails to allege facts that show the conduct was extreme and outrageous. Although Plaintiff alleges that he has been on the receiving end of insults and sabotage attempts on certain of his internet accounts, liability for intentional infliction of emotional distress "does not extend to mere insults indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.* Plaintiff also fails to adequately allege that he suffered severe or extreme emotional distress. Plaintiff alleges that he has become reluctant to take certain actions on his Discord server and Reddit account and has been reluctant to collaborate with other streamers, which he alleges are symptoms of paranoia and anxiety. (Am. Compl. ¶¶ 74-75.) These allegations are insufficient to meet the "high bar" required to show severe emotional

1 distress. *Hughes*, 46 Cal. 4th at 1051. Accordingly, Plaintiff's claim for IIED is DISMISSED.
2 The Court finds that further leave to amend would be futile here. Plaintiff's amendments in the
3 amended complaint provide variations on the allegations in the original complaint but are still far
4 from establishing a plausible claim for IIED. Accordingly, the Court dismisses this claim WITH
5 PREJUDICE.

6 CONCLUSION

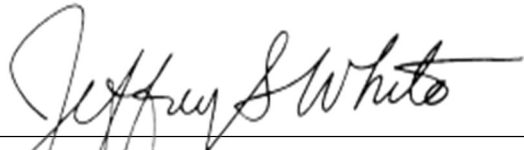
7 Having reviewed the allegations of the amended complaint pursuant to Section 1915, the
8 Court finds that Plaintiff's 17 U.S.C. section 512(f)(2) and IIED claims fail to comply with Rule 8,
9 and the Court dismisses those claims with prejudice. *See* 28 U.S.C. § 1915(e)(2). However,
10 Plaintiff has adequately alleged copyright infringement and a claim for misrepresentation under
11 Section 512(f)(1) and may proceed on those claims.

12 Accordingly, it is ORDERED that the Clerk issue summons, and it is FURTHER
13 ORDERED that the U.S. Marshal for the Northern District of California serve upon the named
14 defendants, without prepayment of fees, a copy of both the original and amended complaints,
15 attachments, this Order, and Plaintiff's motion for a TRO.

16 The Court DEFERS taking action on Plaintiff's application for a TRO until it receives
17 acknowledgement of service from the U.S. Marshal as to Defendant Discord, Inc., at which point
18 it will set an expedited briefing schedule on Plaintiff's application.

19 **IT IS SO ORDERED.**

20 Dated: August 3, 2021

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22 _____
23 JEFFREY S. WHITE
24 United States District Judge
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